No. 18,240

IN THE

United States Court of Appeals

For the Ninth Circuit

JANE G. WEST and RALPH E. WEST,
Appellants,

vs.

RUTH SHIZUKO TAN, individually and doing business as BANYAN INN,
Appellee.

Appeal from the United States District Court for the District of Hawaii

BRIEF ON BEHALF OF APPELLEE

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Appeal from the United States District Court for the District of Hawaii

BRIEF ON BEHALF OF APPELLEE

JURISDICTION

The jurisdiction of the District Court was based upon 28 U.S.C. Sec. 1332 (R. 3). The jurisdiction of this Court is founded on 28 U.S.C. Secs. 1291 and 1294.

Judgment for Appellee was entered on May 7, 1962 (R. 42). Notice of Appeal was filed on June 5, 1962 (R. 44).

STATEMENT OF THE CASE[1]

This is an appeal from the judgment of the District Court setting aside a verdict in favor of Appellants and entering judgment for Appellee (R. 42).

Appellant Jane G. West fell and injured herself in stepping off a bandstand on the premises of Appellee's restaurant, the Banyan Inn, on Maui, Hawaii. She and her husband brought an action for damages against Appellee (R. 2).

Appellants were vacationing in Hawaii and had flown to Maui from Honolulu the afternoon of the accident with two friends (R. 261). After driving to Lahaina from the Maui airport, the party registered at their hotel about 5:30 p.m., and enjoyed drinks on a lanai while watching the sunset (R. 105-07, 228, 297).

After dark the party walked along a path, through a park to the Banyan Inn for dinner (R. 107, 298). Appellant brought along some sheet music because she wanted to play the piano for her companion, and had heard that there was a piano at the Banyan Inn (R. 266).

The Banyan Inn is constructed so that the dining room area opens onto an uncovered dance floor. On the other side of the dance floor, thirty feet from the dining area, was a bandstand with a concrete floor

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[1]Appellants' statement of the case fails to comply with Rule 18-2(c) of this Court requiring "record references supporting each statement of fact or mention of trial proceedings" and it is controverted. All references to the record in this brief are pages as numbered by the clerk and are indicated thus "(R. .....)".

eight inches higher than the dance floor (R. 73-5, 122, 456, 484).

When Appellant arrived, the dining area was lighted, but the dance floor and bandstand (which was not in use) were not, although she could see the piano on the bandstand (R. 268). The party was seated and dinner and drinks were ordered. A waitress was asked whether it would be all right if Appellant played the piano (R. 270), and she replied either, "It's up to you" (R. 440), or "That would be wonderful" (R. 77).

It is undisputed that the bandstand and piano were solely for the use of musicians who played at the restaurant and not for the patrons (R. 426-9, 513-15). Appellee always had a sign on the piano fastened with scotch tape "Do not play piano" (R. 514), but Appellants denied seeing it (R. 272).

After the local Lions Club meeting was over and the members dispersed, Appellants walked across the dance floor to the bandstand (R. 272). She was able to see the raised floor clearly and climbed upon it without difficulty (R. 301, 304). She sat at the piano upon a folding chair which her husband had obtained from a stack of chairs on the bandstand. Appellant proceeded to play tunes from memory while her husband found a lamp which he turned on and held so that Appellant could read her sheet music. Appellant played for a few minutes, after which she was informed by the waitress that the soup was served (R. 273, 275).

She completed her playing and started back to her table. As she walked off the bandstand she fell, injuring her left elbow and ankle. Appellant described what happened as follows:

> Well, in going up, there was 3 or 4 steps up to the piano, and I turned around to go back. I looked to see if I could find the edge of the step, 2 or 3 steps, knowing that, that was what I took going up—the piano was quite close—there was nothing to show the edge of the step, it was dark and with the light from the dining room laying so it looked like one floor, just had the appearance of one floor running, melding into each other.
>
> I finally found the edge of the step and put my left foot down, and as the foot was going down, it wasn't reaching the bottom, it gave me a little —set me off balance and I turned over on my ankle and then threw out my elbow to save my fall (R. 276-77).

On cross-examination, Appellant reiterated that she found the edge before she stepped down and fell (R. 324-25). She was wearing wedge shoes (R. 242-43). Mr. Apo, a county liquor inspector, saw Appellant who appeared as though she had been having some drinks (R. 458). It appeared to him that she walked off the platform without remembering the step (R. 456-57, 500-01).

At the close of Appellants' case, Appellee moved for a directed verdict (R. 402) which motion was renewed at the conclusion of Appellee's case (R. 551) and the court reserved ruling until after the verdict (R. 554).

The jury returned a verdict for Appellant of $10,000 and $856 for her husband (R. 593) which was set aside on motion and judgment notwithstanding the verdict entered for Appellee (R. 42).

QUESTION PRESENTED

May a restaurant patron recover for injuries received from falling while stepping down from a bandstand (not provided for use by patrons) where she had been playing a piano for her own pleasure, when she was fully aware of the step down to the floor and of the lighting on the bandstand, both before and after she stepped upon it?

SUMMARY OF ARGUMENT

Appellant was aware of the difference in levels between the dance floor and the bandstand as well as the lighting on the bandstand. Any danger inherent in going up on the bandstand and leaving it was obvious and known to her. Since a landowner has no duty to warn anyone, whether invitee or licensee, of known or obvious danger, Appellants cannot recover.

When Appellant left the area provided for patrons of the restaurant and climbed onto the bandstand to play the piano for her own amusement, she became a licensee. A licensee may recover only for willful or wanton conduct or active negligence on the part of the landowner.

Moreover, Appellant was contributorily negligent as a matter of law when she stepped down from the bandstand knowing that she was unable to see the floor clearly without waiting until her eyes adjusted to the lighting and without asking for assistance from her husband or from Appellee'e employees. In climbing on the bandstand and stepping off with full knowledge of its condition, Appellant assumed the risk of injury.

ARGUMENT

I

THE BANDSTAND WAS NOT PROVIDED FOR THE USE OF PATRONS; WHEN APPELLANT CLIMBED ON IT, SHE WAS A LICENSEE

The undisputed testimony is that the bandstand and piano were not provided for the use of the patrons of the Banyan Inn (R. 426-28, 513-15). Appellant was aware of this fact as anyone would be who walked into a restaurant and saw a piano on a dark and deserted bandstand. That is why Appellant asked her friend to get permission from the waitress to play the piano and then asked herself (R. 270-271).

Appellant was an avid piano player who apparently wanted to play the piano wherever she went (R. 266). She was not invited to perform, but did so for her own amusement a few minutes before her dinner was served.

In leaving the dining area and going up on the bandstand (which was not for the use of the guests),

Appellant became a licensee. The duty of the owner in such case is not measured by the same standard as the duty owed to business guests in places provided for public use. A business visitor who receives permission to enter an area reserved for employees for his own private purpose should not expect the same standard of care for his safety that he might expect in places designated for his use. This rule is well settled.

In *Paris v. Howard D. Johnson Co.,* 340 Mass. 739, 166 N.E.2d 735 (1960), the court set aside a verdict for plaintiff where it appeared that she entered a restaurant through an entrance normally used for deliveries and fell because the floor inside the restaurant was at a lower level. No "do not enter" sign was posted. Although plaintiff had gone to the restaurant to eat, she was only a licensee at the place where she fell, and was not entitled to recover.

The court held:

> The plaintiff's status at the place where she fell was no better than that of a bare licensee to whom defendant owed no duty except to refrain from willful or wanton conduct. It follows that the court erred in denying defendant's motion for a directed verdict (p. 737)

The common law rule is that a licensee can only recover from a landowner for willful and wanton conduct or knowingly failing to warn a licensee of a hidden trap or peril. 65 C.J.S., *Negligence,* Sec. 381; *Martin v. Houser,* 299 F.2d 338 (9th Cir. 1962); *McHenry v. Howells,* 201 Ore. 697, 272 P.2d 210

(1954); *Fisher v. General Petroleum Corp.,* 123 Cal. App. 2d 770, 267 P.2d 841 (1954). A licensee takes the premises as he finds them along with any risk incident to their use. *Plotz v. Greene,* 13 A.D.2d 807, 215 N.Y.S.2d 813 (1961); 65 C.J.S., *Negligence,* Sec. 35d.

When a business guest is permitted to use a toilet not ordinarily used by customers in an area reserved for employees, the guest becomes a licensee and the owner is not liable for injuries sustained if the customer trips or falls on a step or on a change in the level of the floor while attempting to get to the toilet. *Liveright v. Max Lifstiz Furniture Co.,* 117 N.J.L. 243, 187 Atl. 583 (1936); *McNamara v. MacLean,* 302 Mass. 428, 19 N.E.2d 544 (1939).

In *Lerman Bros. v. Lewis,* 277 Ky. 334, 126 S.W. 2d 461 (1939), the court held that a customer who entered a store, and, with permission, proceeded to an alteration room reserved for employees in search of a particular saleswoman, and who, upon entering the room, fell down a stairway, was a mere licensee required to take the premises as she found them, and the storekeepers were not liable for the injuries sustained. Accord: *Thompson v. Beard and Gabelman Inc.,* 169 Kan. 75, 216 P.2d 798 (1950); *Gayer v. J. C. Penney Co.,* 326 S.W.2d 413 (Mo. Ct. App. 1959).

The soundness of the rule changing an invitee's status when he exceeds the area of his business invitation is apparent in this case. Appellee provided an ordinary bandstand for the use of an orchestra to entertain her patrons on occasion, and Appellee could

reasonably expect that musicians would be familiar enough with the bandstand not to fall off it. It would be unreasonable to require that a bandstand designed for use by an orchestra be maintained in the same condition as entryways or other areas provided for use by patrons.

There was no evidence which could be construed to include the bandstand within the area of a business invitation. Plaintiff was no more a business invitee on the bandstand than she would have been if she were permitted to play the piano in a friend's house. Whether she played well or whether her music was enjoyed by others, as Appellants argue, is irrelevant to her status. She was not hired or invited to entertain (Appellants' Brief, p. 9).

The fact that informal dress was the order of the day has no bearing on whether plaintiff was a licensee or invited on the bandstand (Appellants' Brief p. 8).

There can be no question that when Appellant walked away from the dining area out across an open dance floor to a dark and deserted bandstand to play the piano for her own pleasure, she became a licensee. The language of this Court in *King v. Yancey,* 147 F.2d 379 (1945), is applicable here:

> . . . Had the lady been along merely for her own benefit or recreation we may assume that the invitation would afford her no protection beyond that accorded a licensee (p. 381).

Since Appellant was a mere licensee on the bandstand, Appellee owed her only the duty to refrain from will-

ful or wanton conduct and to warn her of hidden traps. The edge of the bandstand was not a hidden trap. Appellant was a licensee and not entitled to recover.

II

APPELLANT KNEW OF THE CONDITION OF THE BANDSTAND; APPELLEE HAD NO DUTY TO WARN HER OF THE EXISTENCE OF THE 8-INCH STEP

Appellant cannot recover unless she can show a duty which Appellee owed her. The duty of a proprietor of a place of business open to the public is only to use ordinary care to give warning of dangers not likely to be discovered or to make the premises reasonably safe where customers may be expected to go. 38 Am. Jur., *Negligence,* Sec. 133; 2 Restatement, *Torts,* Sec. 343, comment b (1934). The duty of a landowner to a person on his premises varies depending upon whether the person is an invitee or a licensee. An invitee is a business guest or other person on the premises for the benefit of the landowner, whereas a social guest or anyone else on the premises with permission is a licensee. *Martin v. Houser,* 299 F.2d 338 (9th Cir. 1962); *King v. Yancey,* 147 F.2d 379 (9th Cir. 1945).

When Appellant left the area provided for guests, climbed up the bandstand provided for the restaurant's musicians, she became a licensee and assumed the risks of her own conduct. Assuming she was an invitee (which we deny), Appellant was at all times aware of the lighting and the obvious fact that she

had to step down from the bandstand to the floor. Accordingly, Appellee had no duty to warn of the 8" step or the darkness of the area of which she admittedly was aware.

As Appellant approached the bandstand, she saw the change in height between the bandstand and the dance floor (R. 301, 304). She observed the lighting on the bandstand and she was "shocked" that the piano was over in a dark corner on a platform (R. 268). Nevertheless, she chose to climb on the bandstand and play. When she was through she realized that she was on a platform and that the edge was two to four steps from the piano (R. 276). She knew she had reached the edge of the platform and was stepping down to the dance floor when she lost her balance (R. 277-78, 324-25).

There is no duty to warn an invitee of known or obvious dangers, and there is no duty to correct a dangerous condition if the invitee or licensee is or should be aware of it. *Mautino v. Sutter Hospital Ass'n.,* 211 Cal. 556, 296 Pac. 76 (1931); *Ambrose v. Moffat Coal Co.,* 358 Pa. 465, 58 A.2d 20 (1948); *McPherson v. Grant Advertising Inc.,* 271 App. Div. 579, 120 N.Y.S.2d 828 (1953), aff'd. 307 N.Y. 652, 120 N.E.2d 839 (1954); *Caron v. Gray's Harbor County,* 18 Wash.2d 397, 139 P.2d 626 (1943); 38 Am. Jur., *Negligence,* Sec. 97; 2 Restatement, *Torts,* Secs. 340, 343 (1934).

In *Mautino v. Sutter Hospital Assoc., supra,* the plaintiff, a nurse, fell on a floor she knew to be slippery. The court held as a matter of law that she

could not recover. Similarly in the *McPherson* case, *supra,* plaintiff fell on a floor which was freshly waxed, but which had not been polished. The court held that since she had seen the waxing going on, she had notice that there might be fresh wax on the floor and no warning was necessary. When an invitee walks along a rocky road in the dark and he knows the condition of the road, he cannot recover when he trips on a rock, *Ambrose v. Moffat Coal Co., supra,* nor can one recover when he falls from a ladder known by him to be unsafe, *Caron v. Gray's Harbor County, supra.*

Appellant (Brief, p. 13) relies on *Swift & Co. v. Schuster,* 192 F.2d 615 (10th Cir. 1951), which illustrates a departure from the settled rule that the invitee's knowledge of danger relieves a landowner of any duty for the invitee's safety. In that case, a meat inspector slipped on the floor which he knew to be wet and slippery when he stepped down from his two-foot-high platform. A divided court held that since his duties required him to work there, the meat company had a duty to provide a safe place to work. This case has been severely criticized by Professor Seavey as illustrating "confusion of thought on the issues involved" because the inspector never complained of his working conditions and was aware of any danger. Seavey, Comment: *Swift & Co. v. Schuster,* 65 Harv. L. Rev. 623 (1952). In any event, it has no application at all to this case since no one required or coerced Appellant into climbing up the musician's bandstand. She did it for her own pleasure.

The basis for holding a landowner liable for injuries suffered on his property is that he has or should have superior knowledge of conditions that might be unreasonably hazardous. 38 Am. Jur. *Negligence,* Sec. 97. None of the cases cited by Appellant deny the proposition that a landowner is not liable if a plaintiff knows of the dangerous condition of the premises or if the danger is obvious.

Appellant (Brief, pp. 16-17) quotes at length from *Chance v. Lawry's Inc.,* 24 Cal.Rptr. 209, 374 P.2d 185 (1962). This case involved the maintenance of a hazardous condition in the foyer of a crowded restaurant. The foyer was 6′ x 10′. Recessed in the wall adjacent to the foyer was a planter's box 6′ long, 1½′ deep, joined to the floor by a base of smooth terrazzo. The restaurant was crowded, plaintiff stepped back to permit other guests to pass. In doing so, she fell into the planter's box and was injured. The court found no error in the instructions below and affirmed the judgment. This does not resemble the facts in this case. There, the plaintiff was in the exact place where guests stand before being seated. She was injured as a result of the hazardous condition of the premises in the very area provided for guests.

Here, Appellant left the area provided for the guests, walked across a dance floor some 30 feet, climbed up on the bandstand to play the piano and in leaving the stand fell and injured herself. The court pointed out that the proprietor was under no duty to warn invitees of obvious dangers (p. 192). Here, Appellant was a mere licensee and had full knowledge

of the condition of the premises. Even had she been an invitee on the bandstand, she would not be entitled to recover under the rule laid down in this case.

III

APPELLANT WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AND ASSUMED THE RISK OF INJURY WHEN SHE STEPPED OFF THE BANDSTAND

Appellant's evidence shows that she was contributorily negligent as a matter of law. She testified on direct examination that she could not see the edge of the bandstand from the piano. However, in leaving she walked forward toward the edge to where she remembered it to be. She could not tell the height of the bandstand and she fell when the drop-off was higher than she expected it to be (R. 276-77).

Later during cross-examination, Appellant's attorney objected to "a misstatement of her direct testimony" saying that Appellant had testified that she found the edge by falling off it (R. 308-10). Taking this cue from the argument of her counsel, Appellant attempted to change her testimony to agree with her attorney's version (R. 311). However, she finally returned to her original story (R. 324-25) after evasive and confused testimony (R. 305-16).

Whether one accepts Appellant's testimony or that of her attorney's erroneous version, she cannot recover because of her negligence. When Appellant got up from the piano, she could not see the edge of the bandstand and the dance floor, and the bandstand

appeared to be level. However, she thought she knew where the edge was and proceeded towards it. If her testimony was (as her attorney erroneously claimed) that she fell off the bandstand because she could not see the edge, she was negligent in walking blindly towards the drop-off. If instead she found the edge but couldn't see how high the bandstand was, she was negligent in stepping down without assistance.

Appellant's husband was on the bandstand with her. He or someone else could have assisted her if asked. Appellant never asked anyone for more light although she realized that she could not see properly (R. 317-19).

Appellant's testimony indicates that the illumination was adequate for her to see where she was going when she climbed on the bandstand (R. 301-04). As she left the piano, Appellant was aware of the fact that she could not see clearly, nevertheless she continued and attempted to leave the bandstand. It is clear that if anyone was negligent, it was Appellant. One who proceeds blindly in the darkness towards a known or possible hazard is guilty of contributory negligence as a matter of law and cannot recover for injuries.

Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941 (1951);

Brant v. Van Zandt, 77 So.2d 858 (Fla. 1954);

Thompson v. Beard & Gabelman, Inc., 169 Kan. 75, 216 P.2d 798 (1950);

Smith v. Simon's Supply Co., 322 Mass. 84, 76 N.E.2d 10 (1947);

Wood v. Wood, 8 Utah 2d 279, 333 P.2d 630 (1959);

Robinson v. King, 113 Cal. App. 2d 455, 248 P.2d 477 (1952).

In *Tyler v. Martin's Dairy,* 175 A.2d 587, 227 Md. 189 (1961), plaintiff claimed that she tripped because she was blinded by the glare of defendant's lights. However, the court held as a matter of law that the plaintiff was negligent because she did not take a moment to momentarily avert her gaze so that she could see where she was going.

No reasonable man would say that Appellant was not negligent since she was aware that she had to step down from the bandstand, she knew she could not see properly, and her husband and others in the restaurant were present to furnish more light or to help her down had she asked.

It is also apparent that Appellant assumed the risk of injury, both in ascending the platform, knowing the lighting conditions, and later in attempting to step down from the platform although she could not see. Appellant had knowledge of the conditions which she claims caused her injury, but proceeded in spite of them. One may not voluntarily expose oneself to a known danger and then recover for injuries caused by it. 4 Restatement, *Torts,* Sec. 893 (1934). Of course, the defense of assumption of the risk in this situation is the corollary of the rule that a landowner is not liable for injuries when the plaintiff was aware of the danger involved. 2 Restatement, *Torts,* Sec. 340 and comment e (1934). The court below was correct in

holding as a matter of law that plaintiff had assumed the risk of injury (R. 41).

In their brief (pp. 2, 3, 6, 11), Appellants seem impressed by the fact that the verdict was unanimous as required by the Seventh Amendment. This of course is irrelevant to the question whether there was substantial evidence to support the verdict. In this jurisdiction the common law prevails (R.L.Hawaii 1955, Sec. 1-1), and the verdict of a jury which is not supported by substantial evidence will be set aside.

Ross v. Insurance Company, 28 Hawaii 404, 407 (1925);

Johnson v. Sartain, No. 4208, Sup. Ct. Hawaii adv., decided October 10, 1962.

As this Court held in *Tradewind Transportation Co. v. Taylor,* 267 F.2d 185 (1959), reversing a judgment in favor of a plaintiff who had slipped on the steps of the Soto Mission:

> We hold that there was not sufficient evidence to establish that at the time of the accident, appellant had knowledge of an unreasonable risk of harm to plaintiff or had knowledge of the existence of a dangerous condition which brought into being any duty by appellant to warn appellee (p. 190).

In this case, there was no substantial evidence to support the verdict and the District Court correctly set it aside and entered judgment for defendant.

CONCLUSION

Appellant, when she left the area of the restaurant provided for guests for her own amusement, was no longer a business invitee but a bare licensee and Appellee was under no duty to warn her of the conditions. Even assuming the acquiescence of the waitress in the desires of Appellant to play the piano could be stretched to extend the area of the business invitation, the conditions of the bandstand were obvious to anyone and Appellant was aware of them. Appellee was under no duty to warn her against the obvious conditions which she knew existed. Finally, upon her own story, Appellant assumed the risk of injury and was guilty of contributory negligence.

The judgment below should be affirmed.

Dated, Honolulu, Hawaii,
January 23, 1963.

Respectfully submitted,

J. GARNER ANTHONY,
Attorney for Appellee.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

Certificate of Counsel

I certify that, in connection with the preparation of his brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Garner Anthony,
Attorney for Appellee.